PUBLIC PROSECUTOR

v.

SAAT HASSAN & ORS.

HIGH COURT MALAYA, MUAR
MAHADEV SHANKAR J
[CRIMINAL TRIAL NO. 1 OF 1983]
21 APRIL 1984

CRIMINAL LAW AND PROCEDURE: *Preliminary enquiry - Offence of Murder - 1st PE held under s. 302 Penal Code - Murder resulted in course of robbery - Accused committed for trial to High Court under s. 396 Penal Code.*

CRIMINAL LAW AND PROCEDURE: *Amendment of charge at trial - Prosecution sought to amend charge to s. 302 Penal Code - Whether open to prosecution to amend charge at stage of High Court trial to one of s. 302 Penal Code.*

CRIMINAL LAW AND PROCEDURE: *Jurisdiction - Power of High Court to proceed with 1st trial on proposed amended charge - Court's refusal to proceed with amended charge under s. 302 - Order of discharge not amounting to an acquittal by High Court - Fresh PE directed under s. 302 Penal Code - Prosecution tendered amended charge under s. 396 Penal Code at conclusion of 2nd PE - Committed to trial under s. 396 Penal Code - Question of double jeopardy and oppression in holding two PEs on same facts - Whether 2nd PE after order of discharge not amounting to an acquittal made by High Court on committal after 1st PE is bar to a trial.*

In this case, the 5 accused persons were charged in the Magistrate's Court Segamat *vide* Criminal Case No. SA 166/79, for an offence under s. 302 of the Penal Code wherein a preliminary enquiry was held on 26 September 1979. At the conclusion of the PE all the accused persons were committed for trial to the High Court, Muar to answer a charge under s. 396 of the Penal Code.

The trial came up for hearing on 3 May 1982 at the High Court, Muar *vide* Criminal Trial No. 7/79 and the prosecution sought to tender an amended charge under s. 302 of the Penal Code. The learned Judicial Commissioner adjourned the matter for consideration to 10 May 1982 and on that date, he refused to allow the trial to proceed on the proposed amended charge but instead discharged not amounting to an acquittal all the 5 accused persons and directed a fresh preliminary enquiry to be held under s. 302 of the Penal Code.

A 2nd preliminary enquiry was then held on 28 August 1982 under s. 302 of the Penal Code at the Magistrate's Court, Segamat *vide* SA 198/82. At the conclusion of this 2nd PE on 19 October 1982 the prosecution tendered an amended charge under s. 396 of the Penal Code and the 5 accused persons were committed to the High Court for trial *vide* Muar High Court Criminal Trial No. 1/83 under s. 396 of the Penal Code pursuant to s. 138 of the Criminal Procedure Code.

The issue in this case was whether the 2nd preliminary enquiry held after the order of the High Court discharging the accused persons not amounting to an acquittal after the 1st preliminary enquiry was a bar to this trial.

Held:

The second preliminary enquiry held after an order of discharge not amounting to an acquittal was given by the High Court upon committal to trial after a first preliminary enquiry was not a bar to this trial and the trial must therefore proceed according to law.

Cases referred to:
Mary Shim v. PP [1961] MLJ 314
Mohd. Kunju v. PP [1966] 1 MLJ 271

Legislation referred:
Criminal Procedure Code, ss. 148, 342, 382, 384
Evidence Act 1950, s. 114
Penal Code, ss. 302, 396

[**Editors Note:** M. Shankar J delivered 5 Rulings on this case. Each Ruling is preceded by a head-note.]

JUDGMENT

1st Ruling Delivered by Mahadev Shankar J:

In this matter I am informed by counsel from the Bar Table and by the learned DPP that there had been an earlier preliminary enquiry in which the five accused had been committed to stand trial in this Court under s. 396 of the Penal Code.

When the case came up on 3 May 1982 the prosecution sought to tender an amended charge under s. 302 of the Penal Code. That section provides for the offence of murder and is the most serious charge under the Code.

The learned Judicial Commissioner adjourned the matter for consideration to 10 May 1982, and on that day apparently refused to allow the trial to proceed on the proposed amended charge. Instead he is said to have granted all accused a discharge not amounting to an acquittal and directed a fresh preliminary enquiry to be held under s. 302 of the Penal Code.

A second PE was then held under a tentative charge under s. 302 Penal Code. And at the conclusion of this PE the officer conducting the PE tendered an amended charge under s. 396 of the Penal Code. This was on 19 October 1982.

It is in consequence of this second PE that the five accused have now been committed to stand trial before me.

Whilst not going so far as to say that this state of affairs amounts to an *autrefois acquit* or a plea in bar, counsel for the accused have levelled the criticism that to hold two PEs on the same facts is having two bites at the cherry and is tantamount to double jeopardy and oppression. They have asked me to rule accordingly. They say that the prosecution should have proceeded under s. 148 and 342 of the Criminal Procedure Code instead.

With respect I am unable to agree. Each case must be decided upon its own facts and where a charge is preferred under s. 302 of the Penal Code it behoves all concerned to proceed with great caution to ensure that society sees that justice is done, and the accused see that they have had a fair trial. The act of the learned Judicial Commissioner was obviously done in the interests of the accused persons.

Under the principles set out under s. 114 of the Evidence Act this Court is entitled to presume that the order of the learned Judicial Commissioner (now impugned) was regularly and properly made.

The case of *Mary Shim v. PP* [1961] MLJ p. 314 is sufficient authority for me to hold that a second PE, after a discharge not amounting to an acquittal after a first PE, is not a bar to a trial.

This case must therefore proceed according to law.

(Since this ruling was given my attention has been directed to s. 382 and s. 384 of the Criminal Procedure Code. I have also read *Mohd. Kunju v. PP* [1966] 1 MLJ 271. These authorities suggest that it was open to the Public Prosecutor to amend the charge and that it was open to the Court at first instance to proceed with the first trial).

2ND RULING

EVIDENCE: *Statement made by prosecution witness - To police in course of investigation - Cross-examination by defence counsel - Whether defence counsel can elicit information as to form and content of all or any Statements made to police - Defence counsel has no knowledge if statements made to police are inconsistent with testimony at trial - Object of cross-examination - Limitations in cross-examination - Legal position.*

EVIDENCE: *Previous statement of witness - Test to be satisfied before defence counsel can cross-examine witness on his previous statement - Whether previous statement must be in writing - Effect of ss. 145(i) and 155(c) Evidence Act 1950.*

The issue in this case was whether a defence counsel can ask a prosecution witness in cross-examination designed to elicit information as to all or any statements he may have made to the police in the course of their investigation into an offence which is the subject matter of the trial in which he was testifying.

Held:

[1] The legal position is that there is no unlimited right in cross-examination to elicit all the previous statements made by a prosecution witness to the police in the course of a police investigation. This must especially be so if the object of the cross-examination was to search for material which may or may not be utilised to dilute the effect of his testimony.

[2] Section 145(i) of the Evidence Act 1950 indicates that a witness can be cross-examined as to previous statements in writing only subject to establishing the existence of the previous written statement and that some part of it contradicts his present testimony and his attention called to it before the previous statement is proved.

[3] Section 155(c) of the Evidence Act is not confined to written statements but before any contradictory statements can be put in, it must be shown that the previous statements are inconsistent with the trial testimony. If the previous statement does contradict the trial testimony, its pedigree can be established by formal proof of the inconsistent statement.

Cases referred to:

Husdi v. Public Prosecutor [1979] 2 MLJ 304; on appeal at [1980] 2 MLJ
Dato' Mokhtar Hashim v. PP [1983] CLJ (Rep) 101
Ramasamy v. PP [1939] MLJ 163
Tahsildar Singh v. State of U.P. [1959] AIR SC 1012

Legislation referred to:

Criminal Procedure Code ss. 112, (i), 113, (i), (ii)
Evidence Act 1950, ss. 145(1) to 155(c)

25 April 1984:

The issue before me is whether a prosecution witness subjected to a general cross-examination designed to elicit information as to the form, and content of all or any statements he may have made to the police in the course of their investigation into an offence which is the subject matter of the trial in which he is testifying.

PW5 Gan Wee Meng has testified that he witnessed the killing of his parents on the night of 21 May 1979. After freeing himself from his bonds he left the house and reported the matter to some neighbours. A little later some police officers from the local police station across the road arrived, in response to a telephone call at about 8.25 p.m. reporting the commission of a criminal offence in the shop. PW5 spoke to them.

A little later other police officers arrived from Segamat. PW5 spoke to them also and gave them details of what had happened.

Presumably at some stage a formal statement was recorded in writing from PW5 by the police.

The defence do not know if PW5 has made statements to the police which are inconsistent with the evidence he has given on oath.

They say that they want to know what PW5 told the police when they arrived at the shop and to compare that with the evidence he has given in Court. It is, they say, not a situation where they already have evidence that what he told the police on arrival was contrary to his evidence in the box.

It is contended by the defence that when s. 113 of the Criminal Procedure Code (the Code) was amended by Act A324/76, the effect was to make all statements made in the course of police investigation admissible for all purposes including impeachment. These statements are admissible, it is said, as substantive evidence subject to the provisions of the Evidence Act.

Consequently it is argued that defence counsel can ask a prosecution witness in cross-examination to recapitulate everything he ever said to the Police in the course of the investigation and if it is established in the course of such a cross-examination that what has been stated to the Police does not tally with the evidence given in Court then the defence can call in aid s. 145(i) and s. 155(c) of the Evidence Act to impeach credit. Mr. Nelson went further to suggest that differences in the manner in which the witness had given his statements to the police (e.g. in halting Malay as opposed to the few bazaar Malay sentences he had articulated in Court) could be made the subject of adverse comment to the jury on the weight of his testimony.

The learned DPP however objected to all this. He submitted that notwithstanding the amendment to s. 113 of the Code, the position was that statements made in the course of police investigation were privileged and it did not matter whether the statements had been reduced into writing, or were merely verbal. The only situation in which such statements could be adduced in evidence was when an application was made to impeach credit. In that case, only the Court could direct the defence to be furnished with a copy of the witness' statement, which the Court would only do after it was first satisfied that there was a material discrepancy.

The following cases were cited in argument i.e. *Husdi v. Public Prosecutor* [1979] 2 MLJ 304 and on appeal at [1980] 2 MLJ and *Dato Mokhtar Hashim v. PP* [1983] CLJ (Rep) 101.

Had this problem arisen before the amendment to s. 113 of the Code on the Act A324/76 I would have had no hesitation whatsoever in rejecting the application of the Defence Counsel. The position is concluded by *Ramasamy v. PP* [1939] MLJ p. 163. By s. 113(i) of the Code, any statement made by a witness during police investigation was inadmissible. The only situation in which it could ever be put under s. 113(ii) was if credible material was first supplied to the Court that the statement contradicted the evidence given on oath in material particular. The Court could then be asked to refer to the statement to see if there was any material contradiction therein and if so, to allow the statement to be used by the accused to

impeach the credit of the witness. Accused's statements under s. 112(i) of the Code were in a special category. They could not be used in evidence against him in his trial.

By amending Act in 1976 the whole of s. 113 was deleted. A statement by accused persons in the course of police investigation became admissible in evidence provided they were made to an officer of or above the rank of Inspector and certain other safeguards observed.

The amendment is not entirely happily structured. Since an accused's statement was now admissible in evidence at his trial why not the statements of a witness? After all the greater must include the less! Beside s. 113(i) which previously precluded the use of witnesses' statements except for impeachment within the narrow confines of s. 113(ii) had been totally repealed.

I must confess that the point argued has caused me some difficulty. If a contradictory statement by a witness to another layman is admissible in cross-examination, it is hard to appreciate, at any rate at first sight, why statements to a police officer should be placed in a special category.

But having considered the matter in some depth I regret that I must hold against the defence.

A close reading of s. 145(i) of the Evidence Act indicates that a witness can be cross-examined as to previous statements in writing only. The existence of the previous written statement must first be established. Then it must be established that some part of it contradicts his present testimony, and his attention called to it, before the previous statement is proved. In other words the previous statement in writing is not substantive evidence. What is evidence is the testimony given on oath at the trial. The previous statement affects the weight to be given to the trial testimony and may in some circumstances reduce its credibility to zero.

Section 155(c) is not confined to written statements. But before any contradictory statement can be put in, it must be shown that the previous statements are inconsistent with the evidence given. In other words the passport for its introduction into the trial is the fact that it contradicts the trial testimony. If it does then its pedigree can be established by formal proof of the inconsistent statement.

I am fortified in my conclusion by the remarks of Abdoolcader FJ in *Dato' Mokhtar bin Hashim v. PP* [1983] CLJ (Rep) 101 which I respectfully adopt. If a mere hunch is not good enough, what is? "A substratum of some basis or foundation" to my mind means adequate material which enables the Counsel to make assertion that a previous statement has been made and that it was contradictory before he can go on to prove it.

Any other construction would make s. 145(i) and s. 155(c) a charter for fishing expeditions into extraneous areas which will result not in a trial within the trial but a trial without the trial.

Husdi's case concerned an attempt by the defence to get copies of all the statements made by the prosecution witnesses to the police. It failed. In the High Court Syed Othman FJ held that police statements were absolutely privileged and consequently there was no right to inspect. Public policy was also called in aid to obviate the possibility of tampering the witnesses. In the Federal Court Tun Suffian LP held that the prosecution should not supply copies of police statements direct to the defence without the instruction of the Court. Only when it is properly proposed to impeach will the Court refer to the police statement and direct the defence be supplied with the statement, if expedient in the interests of justice.

But *Husdi's* case related to the verbal statements which had been reduced to writing under the provisions of s. 112 of the Code. That is to say the application was for the document. Here we are concerned with the verbal statements made by the witnesses in the course of an investigation which may or may not have been reduced to writing in some police record.

Nevertheless, in my view, to permit what is proposed by the defence would be to negate the effect of the ruling in *Husdi's* case both at first instance and on appeal, and this Court is bound by that decision.

Some clue to what the legal position in West Malaysia is, may be afforded by a comparison with what the Indian Supreme Court said in *Tahsildar Singh v. State of U.P.* AIR [1959] SC 1012 at pp. 1023-1026. I quote:

> The object of the main (Section 162 Criminal Procedure Code), as the history of its legislation shows and the decided cases indicate is to impose a general bar against the use of statement made before the police and the enacting clause in clear terms says that no statement made by a person to a police officer or any record thereof, or any part of such statement or record, may be used for any purpose. The words are clear and unambiguous. The proviso engrafts an exception on the general prohibitions and that is, the said statement in writing may be used to contradict a witness in the manner provided by s. 145 of the Evidence Act. We have already noticed from the history of the section that the enacting clause was mainly intended to protect the interests of the accused. At the stage of investigation, statements of witnesses are taken in a haphazard manner. The police officer in the course of his investigation finds himself more often in the midst of an excited crowd and babel of voices raised all round. In such an atmosphere, unlike that in a Court of Law, he is expected to hear the statements of witnesses and record separately the statement of each one of them. Generally he records only a summary of the statements which appear him to be relevant. These statements are, therefore, only a summary of what the witness says and very often perfunctory. Indeed, in view of the aforesaid facts, there is a statutory prohibition against the police officers taking the signature of the person making the statement, indicating thereby that the statement is not intended to be binding on the witness or an assurance by him that it is the correct statement.
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> At the same time, it being the earliest record of the statement of a witness soon after the incident, any contradiction found therein would be of immense help to an accused to discredit the testimony of a witness making the statement. The section was therefore, conceived in an attempt to find a happy via media, namely while it enacts an absolute bar against the statement made before a police officer being used for any purpose whatsoever, it enables the accused to rely upon it for a limited purpose of contradicting a witness in the manner provided by s. 145 of the Evidence Act by drawing his attention to parts of the statement intended for contradiction. It cannot be used for corroboration of a prosecution or a defence witness or even a Court witness. Nor can it be used for contradicting a defence or a Court witness. Shortly stated, there is a general bar against its use subject to a limited exception in the interest of the accused, and the exception cannot obviously be used to cross the bar.

So also in West Malaysia the legal position must be that there is no unlimited right in cross-examination to elicit all the previous statements made by a prosecution witness to the police in the course of a police investigation. This must especially be so if the object of the cross-examination is to search for material which may or may not be utilised to dilute the effect of his testimony.

As the decisions indicate, the right is a limited one and unless the applicant can first satisfy the Court that he is within the exceptions, the statement must be excluded.

I rule accordingly.

3RD RULING

CRIMINAL LAW AND PROCEDURE: *Alibi - Defence of alibi - Evidence in support - Accused had indicated in cross-examination at PE he was not at scene of crime - Whether it amounts to giving Notice to rely on defence of alibi - Section 402A CPC.*

CRIMINAL LAW AND PROCEDURE: *Mistaken identity - Accused advanced during trial case of mistaken identity or denial he was at scene of crime - Notice of alibi required under s. 402A CPC not given to prosecution - Whether accused precluded from advancing case of mistaken identity - Failure to give written notice of alibi - Whether accused can lead affirmative evidence in support of defence of alibi - Scope of s. 420A CPC.*

This ruling relates to the effect and implications of the admissibility of alibi evidence pursuant to s. 402A of the Criminal Procedure Code.

Held:

[1] As the 1st accused had indicated in his cross-examination at the 2nd preliminary enquiry on 26 September 1982 that he was not at the scene, the prosecution should be taken to be aware from then on that the 1st accused was going to rely on an alibi. Since the 1st accused had already then given the names of the witnesses he proposed to call i.e., his father and mother he should be permitted to give this evidence and call witnesses he had named.

[2] Even though no notice was given for the 2nd accused under s. 402A of the Criminal Procedure Code and there was no evidence legally admissible in support of such a defence of "true alibi" being put forward by the 2nd accused he was not precluded from advancing to the jury for their consideration a case of mistaken identity or denying that he was at the scene of the crime even if he was in the vicinity and draw the jury's attention to the other evidence which he claims supports this defence.

[3] However, since there was no written notice of any kind before the Court which could be regarded as being an attempted compliance with s. 402A of the Criminal Procedure Code it was not open for the 2nd accused to lead affirmative evidence in support of a defence of alibi either by himself or by any witnesses called by him.

Cases referred to:

Rangapula v. PP [1982] 1 MLJ 91
R. v. PJ Cooper [1979] 69 Cr. App. R. 229
PP v. Lim Chen Len [1981] 2 MLJ 41
R. v. Hassan [1970] 1 All ER 745
R. v. Sullivan [1970] 2 All ER 681
R. v. Lewis [1969] 2 QB 1
Che Chi Tiam v. Public Prosecutor [1982] 1 MLJ 88
Ku Lip See v. Public Prosecutor [1981] 1 MLJ 258; [1982] MLJ 194 FC

Legislation referred to:

Criminal Procedure Code, ss. 113, 402A, (2)
Penal Code, ss. 302, 396.

Other source referred to:

Archbold, 40th Edn., para. 583b

3 July 1984:

Ruling on Admissibility of Alibi Evidence - 2nd accused

This ruling concerns the effect and implications of s. 402A of the Criminal Procedure Code which was brought into force by amending Act A324 of 1976.

On 26 September 1979 a first preliminary enquiry was held against the accused in the Magistrate's Court at Segamat. The tentative charge was under s. 396 of the Penal Code i.e., gang robbery in the course of which murders were committed at Tenang in a sundry shop of its proprietor and his wife.

The four accused with whom we are now concerned were then unrepresented. On 23 October 1979 Gan Wee Meng the son of the murdered couple and the only eye witness to the incident gave evidence. The first accused reserved his cross-examination. The second accused put to Gan Wee Meng that he the second accused was standing in a crowd which had gathered shortly after the deaths but Gan Wee Meng had not pointed out to him. He also put it to Gan Wee Meng that Gan was not in the shop at the material time and advanced a case of mistaken identity. Pausing here it is observed that the second accused did not say where he was at the time of the incident but appears to have given notice that he was in the vicinity shortly after the deaths had taken place. That he challenged Gan's presence in the shop also lends some support to this inference. The third accused put it to Gan that he the third accused was at home at the time. The fourth accused Moideen has been acquitted at the close of the case for the prosecution and we are not concerned with him. The fifth accused also put it to Gan that he was not present that night.

At the conclusion of the first preliminary enquiry, all the accused were committed to stand trial. The first accused gave the names of his father and mother as the witnesses he wished to have summoned at the trial. The second accused gave the name of Mimah bte Ahmad of Voules Estate, Tenang. The third accused gave the name and address of the same person. The fifth accused gave the names of three witnesses all of whom resided at Kg. Pulau Masjid Tanah, Malacca.

The trial commenced in the High Court at Muar on 3 May 1982. On 19 April 1982 Mr. E. Ramasamy Counsel for the fourth accused gave written notice of his intention to put forward a defence of alibi for the fourth accused. (The other 4 were still unrepresented.) On 29 April 1982 he was assigned for the other 4 accused. But by 3 May 1982 no formal notice had been served under s. 402A for them. The prosecution intimated it wished to amend the charge to one for murder and on that day all the accused were consequently discharged not amounting to an acquittal on the charge under s. 396 of the Penal Code. A second preliminary enquiry was then convened on the tentative charge of murder.

This second preliminary enquiry began on 28 August 1982. Gan Wee Meng was again called to testify. On 26 September 1982 the accused's opportunity to cross-examine arrived.

The depositions do not record the questions. Only the answers.

In answer to the only question by the first accused Gan said "I saw you at the scene."

To the second accused he answered "Yes you were at the scene and murdered my mother. I do not know you stayed near my house."

To the third accused he said "You were at the scene that night. I do not know you are from Tenang Station."

To the fifth accused he replied "Yes you were at the scene."

Once again the accused were committed to stand trial not be it noted on the tentative charge of murder under s. 302 of the Penal Code but once again under s. 396 of the Penal Code.

All the accused reserved their defences. As for witnesses they wished to summon the first accused again gave the same names i.e., of his father and mother, the second and third accused again each named the same person i.e., Mimah bte Ahmad, and the fifth accused submitted the same three names as he did before.

The second trial commenced on 21 April 1984.

By a written notice dated 27 March 1984 two counsel were assigned, one for the defence of the first and second accused, and another for the third and fifth accused.

Counsel on behalf of the third accused served a formal notice under s. 402A(2) dated 10 April 1984. He claimed to be in Voules Estate Tenang (which is his residential address) and in addition to the name of his mother Mimah bte Ahmad already furnished at the close of the preliminary enquiry, he gave the names of 3 additional witnesses.

Similarly in respect of the fifth accused, counsel served a separate notice in the same format. In addition to the three names already furnished at the close of the preliminary enquiry he gave three other names. But the place where the fifth accused claimed to be was not stated in the notice as his home at Kg. Pulau, Sg. Baru Masjid Tanah, Malacca, but Voules Estate, Tenang, Segamat, Johore.

By an A.R. Registered letter dated 14 April 1984 Counsel for the first and second accused also gave notice under s. 402A. The letter reads in material particular:

> As assigned Counsel and Solicitors for the first and second accused we hereby give you notice of alibi under s. 402A of the Criminal Procedure Code in respect of the 1st accused.

The notice then went on to say that the first accused would claim he was at his parents' house at Batu 13 Tenang and named them as his witnesses.

The omission to state in this letter that the second accused was also going to advance the defence of an alibi at the trial should be emphasised. Also the fact that it was received by the prosecutor only on 17 April 1984 three clear days before the trial.

When the trial commenced on 21 April 1984 nothing was said about these inadequacies. According to the learned Deputy Public Prosecutor sometime during the first week of the trial he verbally informed counsel for the first accused that he was going to object to any alibi evidence being given for the first accused. But counsel did not take any further action on the matter at the time. The trial then proceeded at great length and the witnesses called were all cross-examined in depth. Two trials within a trial were also held to determine the admissibility of confessions made by the first and third accused.

In the cross-examination of PW5 Gan Wee Meng on 26 April 1984 it was put to him that he had made a mistake as to the identity of all the accused, and that none of the accused were in the shop at the material time. On 23 May 1984 the first accused gave evidence in the presence of the jury on the issue of the alleged voluntary nature of the confession attributed to him. He said he was at home watching TV at the time of the offence and had his parents as witnesses to that fact. This evidence was not objected to at the time.

On 17 June 1984 the prosecution substituted amended charges for murder under s. 302 of the Penal Code against all the accused, on the basis of the evidence led up to that point in time. All the accused claimed trial to the amended charge. The prosecution then rested its case, and Counsel for the accused made a submission of no case. As there was no evidence against the fourth accused the jury were directed to return a verdict of not guilty against him and he was acquitted and discharged. The other four accused were called upon to enter their defence.

The first accused elected to give evidence on oath. As soon as he commenced to give evidence about the TV set he had purchased on 21 May 1979, preparatory to leading further evidence that he was watching TV at home that night, the learned Deputy Public Prosecutor

objected to the admissibility of this evidence as amounting to laying the foundations for evidence of an alibi for which the requisite notice had not been served under s. 402 A of the Criminal Procedure Code.

Legal arguments were then addressed to me and I gave an immediate ruling as regards the first accused that as he had indicated in his cross-examination at the Second Preliminary Enquiry that he was not at the scene, the prosecution should be taken to be aware from then on (i.e., 26 September 1982) that he was going to rely on an alibi. Since he had already then given the names of the witnesses he proposed to call i.e., his father and mother, I ruled that he should be permitted to give this evidence and call the witnesses he had named. He did so and the case for the first accused has now been closed.

But the arguments on the issue have raised in sharp focus serious problems faced by the second and fifth accused who also propose to call evidence that they were elsewhere at the material time.

So far as the second accused is concerned, his counsel Mr. Nelson informed the Court on 25 June 1984 (in the absence of the jury) that before he put the second accused in the witness box he wished to establish whether the second accused would be permitted to give evidence that he was not in shop when the murders were committed, that he was in fact with the third accused in the house of the latter at Voules Estate. Also whether he would be permitted to call the third accused's mother as his witness.

Mr. Nelson placed very heavy reliance on *Rangapula v. PP* [1982] 1 MLJ 91 which he said was authority for proposition that s. 402A did not prevent an accused person himself testifying that he was not present at the scene of the crime. It only precluded him in the absence of proper notice from calling other witnesses in support of an alibi. Furthermore as the third accused had given proper notice the evidence of the third accused and his mother, Mimah bte Ahmad would be before the Court when the time came, so any formal notice would have been superfluous. Finally it was contended that the ruling made in favour of the first accused applied equally to the second accused.

The learned Deputy Public Prosecutor strongly objected to all this evidence and relied upon a line of cases decided since 1976 all of which appeared to suggest that if there was no rigid compliance with s. 402A the evidence was inadmissible and the Court had no discretion in the matter.

The effect of the Deputy Public Prosecutor's objection on point was not lost on the fifth accused. On 20 June 1984 his Counsel was made to realise that there was an error in his notice under s. 402A for the fifth accused. When the point was raised then, I said I would deal with this at the appropriate time. Shortly afterwards Counsel for the fifth accused filed a motion supported by affidavit evidence contending that there had been a clerical error in the preparation of the notice. Unfortunately the typist had typed the same alibi address i.e., Voules Estate on both the notices for the third and fifth accused. There is a prayer for the Court to permit an amendment to the Notice to correct it to read Kg. Pulai Masjid Tanah, Malacca.

At the conclusion of both preliminary enquiries the accused persons with whom we are now concerned were not represented. When they were asked to submit the names of the witnesses they proposed to call it would have been helpful for the Magistrate to have drawn their attention to s. 402A (even though there was of course no legal obligation for him to do so) especially as it should have been apparent that some kind of alibi was going to be relied upon.

Had the learned Deputy Public Prosecutor given categoric notice, on the day fixed for the trial to begin, to defence counsel that he was going to object to inadequate notice (in the case of the first accused) it would have been a simple matter to adjourn the trial for at least 10 days to put the matter right for them: See *R. v. PJ Cooper* [1979] 69 Cr. App. R. 229 and *Archbold* Edn. 40 para. 583b.

The position of the first accused is very different from that of the second accused. The ruling made permitting the first accused to call evidence cannot assist the second accused. Apart from some verbal notice by the first accused at the second preliminary enquiry on 26 September 1982, coupled with the giving of notice of his intention to summon his parents, written notice was given on 14 April 1984. The trial of the first accused on the murder charge commenced on 16 June 1984 when he was asked to plead thereto. Even if his notice was inadequate in point of time for the case under s. 396 which commenced on 21 April 1984 I felt compelled to hold that the new charge remedied the situation.

But as regards the second accused, I am unable to regard his questions in both the preliminary enquiries as amounting in any sense to even a hint of an alibi. It was at best a suggestion of mistaken identity. Furthermore as counsel for the first and second accused, the notice under s. 402A dated 14 April 1984 was confined to the first accused alone. This omission could not have failed to have the necessary inferential impact on the mind of the Prosecution. Consequently there is no written notice of any kind before the Court which could be regarded as being an attempted compliance with s. 402A.

What is left for the second accused by way of admissible evidence on his own behalf, must depend on what exactly was decided by *Rangapula v. PP* and the extent to which it is good law.

On 27 February 1981 Mohamed Azmi J decided *PP v. Lim Chen Len* [1981] 2 MLJ 41. It was an appeal from a conviction for extortion in a summary trial in the Magistrate's Court. The trail commenced on 30 May 1979. Notice was given on 28 June 1979. In the face of objections by the prosecution the learned Magistrate allowed the accused, his wife and two other witnesses to give evidence that at the time of the offence the accused was not in Kuala Lumpur but in Slim Village Perak. On the basis of this evidence the accused was acquitted and discharged. The Public Prosecutor appealed.

Azmi J held that the words "evidence in support" of a defence of alibi includes the evidence of the accused himself. He also held that the failure to comply with the ten days pretrial notice was fatal. The submission of the accused respondent's counsel on appeal that the Court had a discretion to waive the pre-trial notice was not accepted by the learned Judge who held that the pre-trial notice was mandatory and that the Courts had no discretion in the matter. Whether or not the police had taken statements from the alibi witnesses in the course of their investigation was held to be irrelevant.

Mohamed Azmi J specifically declined to follow the English authorities of *R. v. Hassan* [1970] 1 All ER 745, 748, *R. v. Sullivan* [1970] 2 All ER 681 at 684 and *R. v. Lewis* [1969] 2 QB 1 all of which were based on s. 11 of the English Criminal Justice Act 1967 which the learned Judge held was not in *pari materia* with the Malaysian s. 402A. The learned Judge could not have been unmindful of *PJ Cooper* [1979] 69 Criminal Appeal Reports 229 as the case was cited to him in argument.

Pausing here, I would observe that it seems apparent that in *Lim Chen Len's* case, there was no application by the defence counsel in the Magistrate's Court to extend time, and the powers of the Court in this regard was consequently not covered.

Next on 21 March 1981 Yusof Abdul Rashid J decided *Che Chi Tiam v. PP* [1982] 1 MLJ 88. This was an appeal from the Sessions Court. The offence charged was causing grievous hurt at Kulai. In the course of the trial an application was made on behalf of the appellant to adduce evidence on alibi and evidence in support thereof. A notice was purportedly given under s. 402A but the learned President held that the section had not been complied with and refused to allow the evidence to be preferred. This decision was upheld on the appeal. The facts relating to the alibi aspect of the appeal are not fully set out, and there does not seem to have been an application to extend time.

On 13 April 1981 the same Judge decided *Rangapula and Anor. v. PP* [1982] 1 MLJ 91. The offence was again causing grievous hurt at Fraser Estate, Kulai, the appellants were convicted, and appealed to the High Court. Unfortunately *PP v. Lim Chen Len* was not cited to the learned Judge. (It had not yet been reported.) He therefore observed that there he was not aware of any judicial decision on s. 402A, and then proceeded to consider the English statute and the cases of *Lewis* and *Hassan* referred to earlier. He held that an accused person shall not be disallowed to state in evidence that a prosecution witness had made a mistake in identifying him because he was somewhere else at the time the offence was committed. Such evidence may be regarded as a total denial of the charge and not "evidence in support of an alibi," within the meaning of s. 402A. The learned Judge then said (at p. 92F RHC):

> I am of the view that s. 402A only applies when the accused proposes to call other person or persons as witness or witnesses to support such evidence.
>
> Section 402A of the Code is enacted to prevent any person from fabricating an evidence of alibi and to enable the police to interrogate the intended witness or witnesses well before the date of trial to ascertain the validity of such a defence. It is indeed a condition precedent to the admissibility of the evidence of a witness purporting to support the alibi of an accused person. The non-compliance with the requirements of s. 402A of the Code will render such evidence in support inadmissible. As such, a trial Magistrate has no discretion to admit any evidence in support of a defence of alibi where the provisions of s. 402A of the Code have not been complied with. To allow such evidence to be admitted notwithstanding the breach of s. 402A of the Code will defeat the intention of the Legislature to cure the mischief of an accused person manufacturing alibi evidence.

In that case there had been a total failure to serve any written notice under s. 402A before the commencement of the trial. Whilst precluding the calling of any witnesses in support, the learned President received evidence from the accused persons themselves and rejected "the defence of alibi." The rest of the case proceeded on the issue of identification.

Ku Lip See v. Public Prosecutor [1982] 1 MLJ 194 is a reference to the Federal Court from the decision of Yusof Abdul Rashid J reported at [1981] 1 MLJ 258. The issue was whether evidence put forward by the defence to the effect that the accused was unlikely to have been present at the scene of the crime amounts to the defence of or evidence in support of an alibi.

The offence alleged was one of rape at Kampong Ulu Pandan Plentong, Johor Bahru. It was said to have been committed at about 7 p.m. between the month of May and June 1978. The date is far from being specific. The accused testified that he was staying in the same Kampong two doors away from the victim's house. He denied going to the riverside in the Kampong where the offence took place and denied the commission of the offence. There was real spatial proximity here, but in reversing the acquittal and substituting a conviction the learned Judge in the High Court observed,

> "If the evidence of a witness called by the accused that the latter had been in the habit of having dinner with him at about the time the offence was committed was intended to provide an alibi, then it was inadmissible for non-compliance with s. 402A."

The Federal Court took cognisance of what Azmi J said in *Lim Chen Len* and concurred that if no notice had been given of evidence considered to be in support of an alibi, then the Court had no discretion but to exclude it.

But whether the evidence in that case amounted to evidence of or in support of an alibi was treated as a question of fact by the Federal Court and therefore not a proper matter for a reference. At p. 196E (LHC) Abdul Hamid FJ (as he then was) said:

> A determination whether particular evidence is evidence in support of alibi entails a consideration whether the evidence shows or tends to show that by reason of the presence of the accused at some particular place or area at a particular time he cannot be or is unlikely to be at the place where the offence is committed. It is difficult if not impossible to envisage with reference to a particular charge what evidence amounts or does not amount to evidence in support of a defence of alibi. It depends very much on the facts of each particular case. It has been described that "What is ordinarily meant by an alibi is that the accused's presence elsewhere is essentially inconsistent with his presence at the time and place alleged, and therefore with participation in the crime. An alibi may absolutely preclude the possibility of presence at the alleged time and place of the act; or the alibi may not involve absolute impossibility, but only high improbability, but only high improbability and yet be convincing." (see *Criminal Law Review* 1978 p. 277-8 and also on p. 278 where it is further stated that "a true alibi defence consists of an affirmative proof of the defendant's presence somewhere other than at the time and place alleged.").

Once again the facts on *Ku Lip See's* case shows that **no** notice was given at all and the case would not appear to be any authority for what is to be done where there is notice but for some reason or other it is not a perfect compliance with s. 402A of the Code.

Applying the law as I see it I rule that even though no notice has been given for the second accused under s. 402A of the Code, he is not precluded from advancing a case of mistaken identity or denying that he was at the scene of the crime even if he was in the vicinity.

As between *Rangapula* and *Lim Chen Len*, if there is a real conflict between them, I am more persuaded that the view of Azmi J is the correct one: s. 402A applies whether the evidence of alibi is given by the accused or by witnesses called by him. It is therefore not open for the second accused to lead affirmative evidence to the effect that he was so far away from the *locus in quo* that it could be held established to a reasonable doubt that he could not have been present where the crime was actually committed and therefore could not have committed it.

Mr. Dass has pointed out the bizarre situation that may now arise when the third accused gives evidence and calls his mother. That evidence will be admissible for him. But if it is evidence of alibi it will not be admissible for the third accused or his mother to state that the second accused was with them at the material time. Nor will it be open for the third accused to lead evidence through the mouth of the second accused in cross-examination to this effect since the second accused has not been stated to be a witness in the written notice properly served by him under s. 402A.

Perhaps even more bizarre is the fact that in his cautioned statement to the Police under s. 113 of the Code the third accused had admitted that he and the other three accused were in the shop at the time and participated in the crimes committed there. He did not give evidence in the trial within the trial. What weight is to be given to this admission as opposed to his proposed defence of alibi at the trial are of course matters for the jury who will consider them at the appropriate time.

So far as the fifth accused is concerned there is now a motion standing in his name for the amendment of the place stated in his notice to read Kg. Pulai Masjid Tanah Malacca and not Voules Estate Tenang as therein stated. The motion has been adjourned to enable the learned Deputy Public Prosecutor to file an affidavit in reply and the right to give a ruling for him would be after the parties have been heard.

4TH RULING

CRIMINAL LAW AND PROCEDURE: *Alibi - Notice of alibi by 3rd accused served on prosecution under s. 402A CPC - Notice did not state 2nd accused as one of 3rd accused's witnesses - Whether open for 3rd accused to elicit evidence from 2nd accused that 3rd accused was with him - 2nd accused failed to serve notice of alibi on prosecution - Defence Counsel for 3rd accused in cross-examination of 2nd accused elicited evidence 2nd accused was in 3rd accused's mother's house and not at scene of crime - Whether evidence admissible - Re-examination of 2nd accused by his counsel reinforces 2nd accused was in 3rd accused's mother's house - Effect of evidence - Whether it amounted to attempting to produce evidence in support of alibi of 2nd accused.*

The issues in this case were whether (1) the 3rd accused having not named the 2nd accused in his s. 402A notice as his witness could elicit evidence from the 2nd accused to that effect (2) whether the 2nd accused not having served the s. 402A notice on the prosecution, could in his re-examination testify that he was in the 3rd accused's house at the time of the alleged offence.

Held:

[1] As the 3rd accused had not named the 2nd accused as one of his witnesses in his formal notice served under s. 402A of the Criminal Procedure Code ("the CPC"), it was not open to the 3rd accused's counsel to elicit evidence in cross-examination from the 2nd accused that he was with the 3rd accused.

[2] However, the court could not stop the 3rd accused from giving such evidence on his own behalf as he had given due notice as required under s. 402A of the CPC and that s. 402A(ii) does not require him to state the names of every person he claims was present. Section 402A(ii) of the CPC only requires him to name the witnesses he proposes to call.

[3] As for the 2nd accused his counsel could not elicit evidence from the 2nd accused and/or the 3rd accused that the 2nd accused was with the 3rd accused as the effect of the evidence was to show that the 2nd accused could not have committed the crime as he was elsewhere and it therefore amounted to attempting to produce evidence in support of Alibi and the line of re-examination by his Counsel was disallowed.

Legislation referred to:
Criminal Procedure Code, ss. 216, 402A, (2)

Other source referred to:
The Criminal Law Review, 1978, p. 276

8 July 1984:

(A) Ruling on Admissibility of Alibi Evidence - 2nd and 3rd accused

On 3 July 1984 before the 2nd accused gave evidence, I delivered a ruling in which I stated that since no notice had been given as required by s. 402A of the CPC it was not open for the 2nd accused to lead affirmative evidence in support of a defence of alibi either by himself or by any witness called by him.

In anticipation of the problems which would arise when the 3rd accused cross-examined the 2nd accused, gave evidence himself and then called his mother in support, I made certain observations on what the 2nd and 3rd accused could and could not do. As it turned out these observations have proved to require clarification in the light of the subsequent submission made to me by the learned DPP and by counsel.

I also said then that since the 3rd accused had not named the 2nd accused as one of his witnesses in his formal notice served under s. 402A it was not open to him to elicit evidence from the 2nd accused to that effect. Mr. Dass in his cross-examination of the 2nd accused has elicited evidence that he, the 2nd accused, was in the 3rd accused's mother's house at 6 p.m., that between 7 and 8.20 p.m. he was not at the scene at 1 & 2 Tenang Station, that he was with Sulaiman at 9.00 p.m. and had seen Gan Wee Meng in a crowd at Tenang about then.

In his cross-examination the DPP referred to 2nd accused's evidence-in-chief that he had left the house of the 3rd accused's mother Mimah at 9 p.m. and went home. It was then put to him that he was never at the scene after he left Mimah's house, but instead of answering that the 2nd accused took the opportunity of saying that he was at Mimah's house between 6 to 9 p.m. If my ruling is right, then that evidence must be inadmissible.

But in his re-examination of the 2nd accused, Mr. Nelson again sought to reinforce this evidence and the DPP maintained his objections. Arguments were again addressed to me that in view of the close proximity of the houses of the 2nd and 3rd accused to the scene, the claim by the 2nd accused that he was in the 3rd accused's house was not a true alibi. If this was an issue of fact then it was a matter for the jury to decide. But the DPP, in my opinion, correctly submitted that the issue was a matter of admissibility of evidence, and that if the evidence was inadmissible, it should be excluded from the jury. I then held that the effect of the evidence was to show that the 2nd accused could not have committed the crime, he was elsewhere and it therefore amounted to attempting to produce evidence in support of alibi and disallowed this line of re-examination.

The 3rd accused elected to give evidence on oath. He had given due notice. He had named his mother as his witness. He had not named the 2nd accused as witness in his notice. In his evidence-in-chief this 3rd accused stated that between 7 and 8.20 p.m. on 21 May 1979 he was at home with his mother and sister. He added that Damiri, the 2nd accused, was with him.

The DPP objected to this evidence as to the 2nd accused's presence and the matter was once again argued in the absence of the jury. The DPP requested clarification as to whether the earlier ruling would operate to exclude this evidence, and if not, whether the 2nd accused could rely upon it and make a submission to the jury to that effect, and if so what weight could be accorded to this evidence.

I had an opportunity then to consider the matter afresh and I held that the Court could not stop the 3rd accused from giving such evidence on his own behalf. He has given due notice under s. 402A and s. 402A (ii) does not require him to state the names of every person he claims was present. It only requires him to name the witnesses he proposes to call.

I reiterated then that Counsel for the 2nd accused could not elicit this evidence from the 3rd accused in cross-examination, but thought then that everybody could comment on 3rd accused's evidence-in-chief on the matter for what it was worth. This is the subject of what now follows.

On 5 July 1984 I heard very full arguments on the motion for the 5th accused. After hearing these arguments I began to entertain serious doubts as to whether the proposed restrictions on the 2nd accused's right to cross-examine the 3rd accused to elicit evidence in support of a defence of alibi for the 2nd accused was correct. The examination-in-chief of the 3rd accused had not yet concluded and I invited counsel to address me further on this, considering that the 3rd accused could not be treated as a "witness he (the 2nd accused) intends to call" within the meaning of s. 402A(ii). Besides s. 216 of the Code gave him a general right to examine any witness not previously named if such witness was in attendance.

But having heard further arguments and considered the full text of the article in *The Criminal Law Review* 1978 at p. 276, I am now of the opinion (albeit with considerable regret) that so far as 2nd accused is concerned the view I have expressed earlier is correct. The key words in s. 402A are "seeks to **put forward a defence** of alibi,". That defence must in the nature of things be the subject of a submission to the fact finding authority be he the Judge or jury as the case may be. If no notice is given, no evidence from whatever source will be admissible in support thereof.

The correct legal position under s. 402A in my view still is that it is not open for the 3rd accused or for his mother to state, at the invitation or behest of the 2nd accused, that the latter was with them at the material time because such evidence will be inadmissible to support a defence of alibi being put forward **by the 2nd accused.**

But it must be remembered that we are now concerned with the exclusion of evidence. As to whether Mr. Nelson can submit to the jury on the existence of the evidence, the parties will do well to remember that what is being excluded is evidence of a true alibi defence as defined in the precedents already cited. Whilst there is no evidence legally admissible in support of such a defence of "true alibi" being put forward by the 2nd accused, it is still open to him to put forward to the jury for their consideration the defence that he was not there, that this is a case of mistaken identity and draw their attention to the other evidence which he claims supports this defence.

5TH RULING

CRIMINAL LAW AND PROCEDURE: *Alibi - Amendment sought to notice served on prosecution - Section 402A(2) CPC - Notice served on prosecution sets out wrong address of place where 5th accused claimed to be at time of commission of alleged offence - Address of place inadvertently states place where 3rd accused claimed to have been.*

EVIDENCE: *Accused - Right of accused to produce material evidence in his defence - Whether substantive right or mere procedural matter.*

CRIMINAL PROCEDURE: *Jurisdiction - Application by notice of motion to amend s. 402A notice - Clerical error as to address of place where 5th accused claimed to have been - Whether Court has power to permit amendment to notice - No remedial provision under s. 402A CPC - Inherent jurisdiction of High Court to secure needs of justice.*

In this case, the issue was whether the Court has the power to permit an amendment to the Notice which was served on the prosecution pursuant to s. 402A(2) of the CPC by the 5th accused.

Held:

[1] The Court was satisfied that the error which occurred on the notice was an inadvertent one and that Counsel for the 5th accused had served his notice under s. 402A of the CPC in good faith and in the honest belief that it fully complied with the said section. Also, it was consistent with the instructions which the counsel had received that the 5th accused proposed to put forward a defence at the trial that at the material time he was not at the scene of the crime but at his home.

[2] The Court was not prepared to hold that the omission to provide remedial powers under s. 402A of the CPC resulted in a denial of the powers of the Court to intervene in an appropriate case unless there is very clear language provided in s. 402A of the CPC which precludes the Court from so doing.

[3] The Court would in this case be failing in its duty if it did not permit the 5th accused to have his notice amended as prayed and an order was accordingly made.

[4] However, the inherent jurisdiction of the Court and for that matter its powers to permit matters to be done in a manner which falls short of strict compliance with the established rules of the procedure, should only be sparingly exercised and where the injustice that would be caused if the Court fails to act would be very grave, and there is no other provision in the law which the applicant could have sought relief.

Cases referred to:

Loy Chin Hei v. PP [1981] CLJ (Rep) 178
PP v. Chew Siew Luan [1982] 2 MLJ 119
Lee Lee Cheng (f) v. Seow Heng Kwang [1960] MLJ 1
Hari Ram Seghal v. PP [1981] 1 MLJ 165

Legislation referred to:

Courts of Judicature Act 1964, s. 25, (2), Schedule 8
Criminal Procedure Code, ss. 4, 5, 310, 399A, 402A
Dangerous Drugs Act, s. 41B
Land Acquisition Act 1960, s. 38(4)

8 July 1984:

(B) Ruling for the Proposed Defence of Alibi for the Fifth accused

On 10 April 1984 Counsel for the 5th accused served a formal notice on the Prosecution to comply with the provisions of s. 402A of the Criminal Procedure Code (the Code). In it he gave notice that he proposed to put forward a defence of alibi and call witnesses in support thereof. The names of these witnesses were set out but the place where he claimed to be at the time of the commission of the offence was not his home at Kg. Pulau Sg. Baru Masjid Tanah, Malacca. It was said to be Voules Estate Tenang, Segamat, Johore.

On 20 June 1984 counsel for the 5th accused was made to realise what had happened here. The place where the 3rd accused claimed to be was said to have unfortunately been transposed into the notice typed out for the 5th accused as well.

Some of the circumstances relating to this matter have already been referred to in the ruling which I have delivered as regards the evidence of the 2nd accused and is therefore not repeated here.

Suffice it to say that as soon as he could prepare the necessary papers after 20 June 1984, Counsel for the 5th accused filed a formal notice of motion in this Court supported by affidavit evidence contending that there had been a clerical error in the preparation of the notice for the 5th accused.

This motion has now come before me coupled with a prayer that the Court should permit an amendment to the notice so that it may correctly set out the place where the 5th accused claimed to be at the time of the commission of the offence stated in the charge.

The issue before me today is whether this Court has the power to permit an amendment to the notice in all the circumstances.

Having considered the evidence before me I am satisfied as a fact that there was a clerical error here committed by the typist of counsel for the 5th accused and I must now decide whether the notice can be amended.

I do not propose to repeat here the in-depth analysis of the Malaysian cases which I dealt with earlier. In all those cases, as I was at pains to point out, there was no **advance** notice given of the intention to put forward a defence of alibi. Consequently it was consistently held that in the absence of such notice alibi evidence was inadmissible and that the Court had no discretion in the matter.

The situation where there had been advance notice which was however defective because of imperfect compliance with the requirements of s. 402A either as regards the provisions relating to time or in some other aspect was left open.

Where such non-compliance occurs due entirely to the fault of legal advisors, or to ignorance on the part of unrepresented accused, or for other reasons which are based on inadvertence rather than any sinister or wilful non-compliance with the provisions of s. 402A, must this type of defence be totally excluded in every case?

This will indeed be the result if a draconian interpretation is placed on the decision of Azmi J in *Lim Chen Len's* case where he said that the provisions of s. 402A are mandatory and the Courts have no discretion in the matter.

The right of an accused person to produce material evidence in his defence is a substantive right and not a mere procedural matter.

It is no less a substantive right than a right of appeal.

Non-compliance with the rules relating to the requirements of giving notice of appeal at the appropriate time or in the appropriate form has never been held to preclude the due process of the appeal where the justice of the case requires. Reference may be made to s. 310 of the Code as regards criminal appeals to the High Court.

Is inadequate compliance with the requirements of s. 402A to be regarded differently?

Section 4 of the Code states that 'nothing in this Code shall be construed as derogating from the powers or jurisdiction of the High Court.' In my view this section expressly preserved the inherent jurisdiction of the High Court to make any order necessary to give effect to other provisions under the Code or to prevent abuse of the process of any Court or otherwise to secure the needs of justice.

Section 5 of the Code now provides that where there is a lacuna in the law for the time being in force in Malaysia then the law relating to Criminal Procedure for the time being in force in England shall be applied so far as the same shall not conflict or be inconsistent with the Code and can be made auxilliary thereto.

The powers of the High Court are referred to in s. 25 of the Courts of Judicature Act 1964 and the High Court in the exercise of its jurisdiction has consequently got all the powers vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction. Section 25(2) of the Judicature Act gives the Court the additional powers set out in the schedule which includes under Article 8 the powers to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding although any application be not made until after the expiration of the time prescribed provided that this provision shall be without prejudice to any written law relating to limitation.

The jurisdiction of the Court immediately prior to Malaysia Day in criminal matters were of a like nature and extent as that held and exercised in England in criminal matters by the High Court of Justice.

In every case the concern of the Court is that substantial justice may be done in the matter.

So far as the present application is concerned, I am satisfied that the error which occurred was an inadvertent one and that Counsel for the 5th accused served his notice under s. 402A in good faith and in the honest belief that it fully complied with the section and was consistent with the instructions which he had received to the effect that the 5th accused proposed to put forward a defence at the trial that at the material time he was not in the scene of the crime but at his home in Masjid Tanah, Malacca.

Having so found on the facts, this Court would be failing in its duty if it did not permit the 5th accused to have his notice amended as prayed and an order will be accordingly made.

In his able argument for the contrary view, the learned DPP drew my attention to s. 399A of the Code where the power of the Court to order otherwise is expressly preserved. No such saving words appeared in s. 402A and it was urged that if the section was modelled on the corresponding English provisions it was significant that the powers of extension of time under s. 11 of the English Act were expressly omitted. Useful comparisons were also drawn with s.

41B of the Dangerous Drugs Act 1952 excluding bail for the offences set out therein and the cases of *Loy Chin Hei v. PP* [1981] CLJ (Rep) 178 and *PP v. Chew Siew Luan* [1982] 2 MLJ 119.

Mr. Dass drew my attention to *Lee Lee Cheng (f) v. Seow Heng Kwang* [1960] MLJ 1, a most useful decision on the distinction between jurisdiction as opposed to power to extend time and *Hari Ram Seghal v. PP* [1981] 1 MLJ 165 which I found of great assistance in the matter of inherent jurisdiction of the Courts to correct any injustice.

In the absence of very clear language, such as is contained in s. 38(4) of the Land Acquisition Act which precludes the Court from enlarging time or s. 41B of the Dangerous Drugs Act 1952, I am not prepared to hold that the omission to provide remedial powers under s. 402A resulted in a denial of the powers of the Court to intervene in an appropriate case.

This trial has been an unusual one in such a variety of respects that I would place a caveat upon this decision being universally applied to other instances where applications are made to remedy a non-compliance with s. 402A of the Code.

The inherent jurisdiction of the Court and for that matter its powers to permit matters to be done in a manner which falls short of strict compliance with the established rules of the procedure, should only be sparingly exercised and where the injustice that would be caused if the Court fails to act would be very grave, and there is no other provision in the law which the applicant could have sought relief.

This is such a case and I rule accordingly.

Also found at [1988] 1 CLJ 80